Supreme Court of the United States

OCTOBER TERM, 1897.

No. 188.

HENRY W. BENJAMIN, APPELLANT,

versus

THE CITY OF NEW ORLEANS ET ALS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SYLLABUS.

Where, in the Circuit Court, the jurisdiction is in issue and is denied, the plaintiff must elect whether he will bring the case to the Supreme Court on the question of jurisdiction alone, or carry it to the Circuit Court of Appeals, upon all the questions involved; the judgment of the Court of Appeals in such latter case can only be reviewed in this court upon a certificate from the former.

McList vs. Raff. 141 U. S. 661–668.
Interior Const. Co. vs. Gibney, 160 U. S. 219.
Chappell vs. United States, 160 U. S. 207.
Warner vs. New Orleans, 167 U. S. 474.
United States vs. Jahn, 155 U. S. 109.

No writ of error lies from this court to the Court of Appeals in any case where the judgment or decree of the latter is final, under section 6 of the act of 1891.

Aztec Mining Co. vs. Ripley, 151 U. S. 80.

Such judgments or decrees are final in every case where federal jurisdiction is founded on the diversity of citizenship of the parties.

United States vs Jahn, 155 U. S. 109.
Rouse vs. Letcher, 156 U. S. 47.
Gregory vs. Van Ee, 160 U. S. 643.
Carey vs. H. and T. Rwy., 161 U. S. 116–133.
Colorado Co. vs. Turck, 150 U. S. 138–144.
Bordmeyer vs. Idler, 159 U. S. 408–415.
Rouse vs. Hornsby, 161 U. S. 588.
Press Pub. Co. vs. Monroe, 164 U. S. 105.

The averment of the bill setting out the citizenship of the parties should be clear and precise; it cannot be made inferentially; where the jurisdiction depends upon the citizenship of one of the parties, plaintiff or defendant, the name of the State in which his citizenship is held must be set out; it is not sufficient to declare that he is a citizen of a State other than that of which the plaintiff or defendant, as the case may be, is a citizen.

Bradley vs. Rhines, 8th Wallace, 393.
Metcalf vs. Watertown, 128 U. S. 586.
Parker vs. Ormsby, 141 U. S. 85.
New Orleans vs. Benjamin, 153 U. S. 411–433.

STATEMENT OF CASE.

On February 9th, 1891, complainant filed his bill in the Fifth Circuit Court for the Eastern District of Louisiana, for an account of all the debts, liabilities and unpaid dues of the Board of Metropolitan Police, created by an act of the General Assembly of the state of Louisiana, No. 4, approved September 14th, 1868; including certain warrants, certificates and claims set out in the bill, and for a like account of the amounts due by defendants, the cities of New Orleans and Kenner, and the parishes of Jefferson and St. Bernard, to the said Board, for the balance of unpaid apportionments of police expenses, as well as all poll taxes collected by the defendants, and withheld from the said Board; that the former be decreed to pay into the hands of a receiver, to be appointed, their several pro rata shares of the amounts so found to be due to the creditors of the said Board of Metropolitan Police, including all costs of the administration thereof, and that the funds thus realized be applied to the payment of the war-

rants, certificates and claims sued on by complainant, and those of such other persons who may be creditors of the Board, who shall come in and establish their claims.

The warrants, certificates and claims held by complainant are described in an exhibit annexed to the bill, and appear to be salaries earned by police officers, and other employees of the Police Board, during the month of December, 1874.

The bill sets up, that by the act of the legislature of Louisiana, No. 74, of 1868, the parishes of Orleans, Jefferson, and St Bernard, were united in a district, called the Metropolitan Police District of New Orleans, State of Louisiana; that the government of the district for police purposes was vested in a Board of Commissioners styled the Board of Metropolitan Police; said Board was authorized to appoint all officers and employees of the force, whose salaries were to be paid monthly; that the Board was required to make an annual estimate of the expenses of maintaining the force, and to apportion the same among the several cities and parishes composing the district, which were required to provide the means of paying and to pay the amounts of such apportionments; that the apportionments made by the Board for the city of New Orleans, for the years 1869 to 1876, inclusive, amounted to $6,155,697.74, and that said apportionments so made and notified to the city New Orleans made it liable to the Board for the amount thereof; that similar apportionments were made to the cities of Jefferson and Carrollton, which were afterwards by legislation consolidated with the city of New Orleans, which by the same was made liable for their debts, including the said apportionments; that like apportionments were made for the parishes of Jefferson and St. Bernard, and the city of Kenner, which were thus likewise made the debtors of the said Board for the amount of such apportionments; that the said cities and parishes were authorized to raise by taxation the sums necessary to pay their respective assessments; that such tax levies were made; that the city of New Orleans, during the period named, included the amount of her apportionment in the annual budget of expenditures, and levied taxes for the purpose of paying the same, out of which she collected and paid large sums of money on account of her pro rata, but not enough to discharge the same, there still being due on account thereof $940,379.60.

That by the provisions of an act of the legislature of Louisiana, approved February 7th, 1869, and other acts, all warrants issued for the salaries of officers, employees and members of the Metropolitan Police, and for the expenses of the said Board, were made receivable for all parish and municipal taxes and licenses in the district, and for all taxes due and to become due in the said parishes and cities, not exceeding in any one the amount of its respective apportionment for that year; that the said Board, pursuant to the said act of 1869, organized a metropolitan police force for the district, and appointed officers and members thereof, who rendered services under contract therewith, and were paid the salaries fixed by law for such employees, such contracts being made upon the faith of its revenues applicable to their payment.

That by an act of the legislature (No. 35), approved March 31st, 1877, the said act of 1869, establishing said district and creating said Board, the said act of 1869 making the said warrants receivable for municipal and parish taxes and debts, an act (No. 94) of 1870 providing means for the payment of the several apportionments mentioned, and an act (No. 16) of 1875, being one to enforce the payment by the city of New Orleans, and the other cities and parishes composing the district, of their several apportionments, as well as all other acts amendatory of those named, or upon the same subject matter, were repealed, and the said Board of Metropolitan Police abolished, and no provision made for the liquidation of its affairs, of payment of its debts.

That the said repealing act of 1877 was in violation of Section 10, Article 1, of the Constitution of the United States, in that it impaired the obligation of the contracts made by the said Board, particularly those sued upon; that the city has, ever since the passage of the said repealing act, continued to collect the said taxes, which are applicable to the payment of the city's indebtedness to the said Board and ought to be distributed among the creditors of the same; that the Board was a body corporate, which by the repeal of the said laws ceased to exist, and had and has no representative or successor, against which suit might be brought for the establishment of plaintiff's demands, and that he is without remedy except in a court of equity, where

matters of such kind are cognizable; that a receiver had been appointed to collect from the city of New Orleans certain apportionments due by it, and to apply the same to outstanding liabilities of the said Board, the appointment of which receiver was afterwards rescinded, before he acted, and that the said Board was now without any successor or legal representative, and that its affairs were no longer under any administration whatever; that a certain suit was brought by one Goldstein, for the appointment of a receiver, and the enforcement of the liabilities of the said several cities and parishes, which suit was afterwards dismissed as to the city of New Orleans, on the ground of want of jurisdiction in the court.

This case was before your Honors in the October term of 1893, upon a certificate of the United States Circuit Court of Appeals for the Fifth Circuit, under section 6 of the judiciary act of March 3d, 1891.

See New Orleans vs Benjamin, 153 U. S. 411.

The questions, four in number, were as follows:

First. Does the case made by the bill alleging that the Board of Police has been abolished and left without a successor or legal representative and no provision has been made for the application of its assets to the payment of its debts and the answer herein, constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana without regard to the diverse citizenship of the parties?

Second. The warrants and certificates held by the complainant having been issued for services rendered and supplies furnished under the contract with the Board of Metropolitan Police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provisions for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of Article 1, Section 10 of the Constitution of the United States?

Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary acts of

1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court of the United States, to establish a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid pro rata upon their claims?

Fourth. Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan Police Board, and the metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond the liability for taxes assessed and collected in pursuance of the apportionment made?

As will be seen, the two first questions may be reduced to one, namely, whether the suit was one of which the Circuit Court had jurisdiction, without regard to the diverse citizenship of the parties? The third sought to ascertain whether the complainant, an assignee, could sue in the Circuit Court, although his assignors could not. The fourth propounded the broad question whether or not the record disclosed a case of absolute liability on the part of the city, beyond that for taxes actually collected by it. The answer to the first question, if in the negative, necessarily involved the second, as, if it were held that the suit was not one arising under the Constitution of the United States at all, it would be useless to inquire afterwards whether it arose under a particular section thereof, namely, section 10 of article 1. If, after the negative answer above made to the first question, which necessarily involved the second, an affirmative answer to the third question would dispense with any necessity at all of an answer to the fourth, which would only become pertinent if, in the event that after considering the first three questions, this court should have held that the Circuit Court had jurisdiction.

By reference to your Honors' decision, 153 U. S., p. 431, it will be seen that the first question was answered in the negative, and that such conclusion covered the second question, which answers to the two was in effect that the suit was not one which involved a dispute or controversy as to the effect or construction of the Constitution of the United States, and hence

did not arise thereunder; the third question was answered in the affirmative, that there was involved no question which would give the Circuit Court jurisdiction, without regard to the diverse citizenship of the parties, the bill containing no averment that it would have been maintained by the assignors had no assignment been made; the answers to the three questions thus given made unnecessary any consideration of the fourth question.

After the finding of this court had been placed of record in the Circuit Court of Appeals for the Fifth Circuit, the latter court dismissed the bill, with leave, however, to amend the same, by setting forth the requisite averment to show jurisdiction, by reason of the diverse citizenship of the parties; thereupon, on April 27th, 1895, complainant amended his bill, by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph, the following averment:

"And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th of February, 1891, citizens respectively of states other than the state of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

The motion to dismiss or affirm is made under the following paragraphs of section 5 and 6 of the act of March 3, 1891, known as the "Circuit Court of Appeals Act:"

Section 5. "That appeals or writs of errors may be taken from the District Courts, or from existing Circuit Courts, to the Supreme Court, in the following cases. * * In any case where the jurisdiction of the court is in issue; in such cases the question of the jurisdiction alone shall be certified to the Supreme Court from the court below, for decision."

Section 6. "That the Circuit Courts of Appeal established by this act shall exercise appellate jurisdiction to be reviewed by appeal or writ of error; final decisions in the District Courts and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeal shall be final, in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the controversy being aliens and citizens of the United States, or of different states. * * * *"

As has been seen, your Honors have already decided that this suit is not maintainable in the Circuit Court, by reason of its being an equity case, arising under the Constitution of the United States, nor on the ground particularly that the statutes in question are an impairment of the obligation of the contract asserted by complainant; the amended bill under which the controversy is brought here ~~by a writ of error~~, seeks to show jurisdiction by reason of the diversity of citizenship of the parties; the demurrer, which was sustained by the Circuit Court, raised two questions, first, whether there was jurisdiction in the Circuit Court, and in the alternative, whether the bill presented any equity; the Circuit Court found that the amended bill contained no averment sufficiently setting forth the citizenship of the assignors of complaint, and hence, that it had no jurisdiction of the case.

The first point made by the motion to dismiss or affirm is that under the first clause of section 5 of the act of 1891, this court has no jurisdiction of the present writ of error; that primarily the only mode by which such questions can be reviewed here is on certificate from the court of original jurisdiction, namely, the Circuit Court; in which event, such question alone must be certified from that court; here the complainant, instead of following the course pointed out by the statute, carried the case ~~by writ of error~~ to the Circuit Court of Appeals for the Fifth Circuit, from which court, after meeting with an adverse decision on his plea of jurisdiction, he seeks to bring the case by writ of error to this court. Your Honors have said, that in a case of this character the complaining party must elect whether or not he will bring his case to this court on the question of jurisdiction alone, or carry it to the Circuit Court of Appeals upon all the questions involved; that the act of 1891 did not contemplate several separate appeals in the same case at the same time, to two appellate courts; and while it is true that complainant's recourse, both to this court and the Court of Appeals are not concurrent or simultaneous, the rule laid down finds clear application, where relief is vainly sought first from the Court of Appeals and afterwards from this court, by writ of error to the former.

McLish vs. Roff, 141 U. S. 661-668.

The jurisdiction of the Circuit Court being at issue, by formal

pleading made in that court, the only mode by which the court's finding upon that question could reach this court by initiative in the inferior courts would be, first, by a certificate from or writ of error to the Circuit Court, under paragraph 2 of section 5 of the act of 1891.

Interior Construction Co. vs. Gibney, 160 U. S. 219.

Chappell vs. United States, 160 U. S. 207.

Second, by certificate from the Circuit Court of Appeals, under the first paragraph of section 6, where it is provided, that in any case where the jurisdiction of the Court of Appeals is final, it may certify to this court questions or propositions of law concerning which it desires instructions.

Warner vs. New Orleans, 167 U. S. 474.

United States vs. Jahn, 155 U. S. 109.

There can, under no circumstances, be a writ or error from this court to the Court of Appeals, because such proceedings, by paragraph 3 of section 6 is limited to such cases, as by paragraph 1, *are not made final* in the Court of Appeals.

Aztec Mining Co. vs. Ripley, 151 U. S. 80.

The present suit being one in which federal jurisdiction is sought on the ground of the diversity of citizenship of the parties alone, *is made final* in the Court of Appeals by the express terms of the first paragraph of section 6.

In the present case it is attempted to bring the case here by ~~writ of error~~ to the Circuit Court of Appeals.

In United States vs. Jahn, 155 U. S. 109, it was held, that if the jurisdiction of a Circuit Court is at issue, and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified, and take his appeal, or writ of error, direct to this court; the contention there was that the jurisdiction was not at issue in the Circuit Court, and even if it had been, it could only be certified by that court to this court; that an appeal having been taken to the Court of Appeals, the action of the Circuit Court, maintaining its jurisdiction, was final, could not be there reviewed, and hence, could not by that court be certified here; under that clause of the act which gave the Circuit Court of Appeals the right to certify to this court any case within its jurisdiction, your Honors maintained that the certificate of the Court of Appeals brought the case properly before you.

The revisory power of this court and of the Circuit Court of Appeals, under the act of 1891, is to be exercised only in accordance with its provisions.

United States vs. Jahn, 155 U. S., p. 109.

Second. By section 6 of the act of 1891, it is provided, that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases where jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states; a decree or judgment in such a suit is not reviewable by this court.

It will be remembered, that plaintiff, having failed to sustain the jurisdiction of the Circuit Court on the ground that this cause is one in equity, arising under the laws of the United States, or maintaining in a Circuit Court, on the ground that the legislative acts set out in the bill were an impairment of the so-called contract sued upon, then sought federal jurisdiction on the ground that his assignors were citizens of states other than Louisiana, of which defendant is a citizen. This course was adopted under the authority of a reservation granting leave for the same in the decree of the Court of Appeals, and complainant has filed his amended bill, setting up diverse citizenship of the parties, confessedly for no other purpose except to show jurisdiction in the Circuit Court. The case is clearly within that class in which decrees of Circuit Courts of Appeal are final, and not subject to review here.

In Rouse vs. Letcher, 156 U. S. 47, as intervenor in a foreclosure suit brought his action against the receiver for damages. The court held that the intervention was a proceeding against property *custodia legis*, and hence that it was simply ancillary or supplemental to the original suit, of which jurisdiction was taken solely on the ground of the citizenship of the parties. The court held that in such class of cases the judgment of the Court of Appeals was final; and the appeal was dismissed.

In Gregory vs. Van Ee, 160 U. S. 643, the court reached the same conclusion, upon substantially the same facts:

See also Carey vs. Houston & Texas Railway, 161 U. S. 116–133; Colorado Central Co. vs. Turck, 150 U. S. 138–144; Bordmeyer vs. Idler, 159 U. S. 408–415; Rouse vs. Hornsby, 161 U. S. 588; Press Publishing Co. vs. Monroe, 164 U. S. 105.

If, however, the court should be of the opinion that this case is before it, and can be considered, the judgment of the Court of Appeals is manifestly correct; the averment of citizenship is vague and general to that degree that it is barely a skeleton compliance with the law; the averment is that the assignors of complainant were, at the time of the institution of this suit, citizens of states "other than Louisiana;" if the complainant himself were suing in his own right, and in setting forth his citizenship merely declared that he was a citizen of a state other than Louisiana, without naming it, the averment would be insufficient; the allegation upon this point must be one of fact, and specifically made; it must set out the name or names of the state or states of which the assignors were citizens; complainant is not allowed to keep this information to himself; the allegation must be such as leaves no doubt as to the requisite citizenship of all parties; it must appear affirmatively, and not by inference.

Brodley vs. Rhines, 8th Wallace, 393.
Metcalf vs. Watertown, 128 U. S. 586.
Parker vs. Ormsby, 141 U. S. 85.
New Orleans vs. Benjamin, 153 U. S. 411-435.

Should the defendants desire to traverse the averment of the bill that complainant's assignors were citizens of states other than Louisiana, and competent to sue in the Circuit Court, in what manner are they put upon warning as to what facts they are to controvert, by the vague and indefinite allegation of the bill? In what states of the Union would they seek for evidence to show that the assignors were not citizens of the states which complainant had in mind when his averment was made? As plain as any fact can be, defendants would be left to grope in the dark in this respect, being unable to anticipate whatever they would be required to meet.

It is clear that to sustain the bill in the Circuit Court on the ground of diverse citizenship, the citizenship of the alleged assignors should have been averred; true, in the discussion on the questions certified to this court, the complainant sought to escape the jurisdictional requirement by the contention that the bill did not seek the recovery of the contents of a chose in action, but the decision of the court was against that contention. 153 U. S., pp. 434 and 435.

The original holders of these warrants were the hundreds of the Metropolitan Police, every one of whom was required to be a citizen of the state of Louisiana. Act No. 74 of 1868, Section 8.

In the long lapse from 1874, when the warrants were issued, and 1891, when the suit was brought, there must have been a complete extinction of all citizenship of many of the original holders in the grave; it is not alleged that any of them survived in 1891; that the complainant had the least knowledge of their citizenship, if any were citizens of states other than Louisiana; with this difficulty the complainant attempted to aver the diverse citizenship of all the police officers, by whom it was alleged that warrants were assigned by the loose general averment that all of the parties in whose favor said claims accrued, i. e., those to whom the warrants were issued, were in 1891 "citizens of states other than Louisiana;" and on this averment the bill was sought to be sustained in a controversy between the defendant, the city of New Orleans, and holders of choses in action assigned to them by citizens of other states.

The defendant naturally demurred to the bill on the ground that there was no sufficient averment of the citizenship of the police officers, the alleged assignors of complainant and the intervening holders; this averment of citizenship may be disputed, and must be proven if denied.

See 8th Wallace, 397; 19th Wallace, 81; 16th Peters, 351.

How could defendant be prepared to dispute, by proof, the loose and general allegation that did not allege the citizenship of each of the assignors by naming the state of his citizenship? The whole question in the case was, whether the random, general allegation in the bill of the citizenship of the assignors was sufficient; the Circuit Court sustained the demurrer, and the inquiry is whether a loose allegation shall suffice, when the law requires it to be specific; if this court can review the judgment of a Circuit Court of Appeals on a question of this character, it is submitted the decision is correct.

It will be noticed that the averment of the citizenship of the assignors of complainant is set up as it was on the 9th February, 8191, the date of the filing of his original bill; there is no averment as to the citizenship of the original holders of the claims from whom complainant acquired, at the date of their acquisi-

tion by the latter; it would thus appear that in complainant's theory if, at the time he filed his bill, his assignors were citizens of states other than Louisiana, he would be competent to sue in the Circuit Court, although at the date of the assignment under which he holds, which was necessarily prior to the filing of his bill, his assignors were citizens of the state of Louisiana, and hence incompetent to sue.

It will be observed, that by section 8 of act 74 of 1868, all officers and employees of the Metropolitan Police Force were required to be citizens of Louisiana, and hence it must be conclusively presumed that the assignors of complainant were citizens of that state, and continued to be such until a change of citizenship shown. At the most, the averment of the bill would show that the assignors retained their Louisiana citizenship up to the date of the filing of the bill, from which it would obviously appear that they were citizens of Louisiana at the time that their claims were assigned to complainant.

But if the allegation of citizenship as found in the bill were sufficient in form to show jurisdiction in the Circuit Court, defendant is entitled to have it made more specific. The averment as it stands assumes the whole question, so far as it depends upon the diverse citizenship of the parties. Not only the defendant, but the Circuit Court itself is entitled to know of what states the assignors were citizens, and the bill should contain a specific averment to this fact.

Should this court have any jurisdiction to review the judgment of the Court of Appeals, it should be affirmed.

Respectfully submitted,

BRANCH K. MILLER,

Solicitor for Defendants and Appellees.

NOVEMBER, 1897.